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No. 1268

In the Supreme Court of the United States

OCTOBER TERM, 1968

MAURICE H. KOWAN,
Defendant-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Respondent.

On Appeal From The Appellate Department, Superior Court, Los Angeles County, California — Case No. CR A 7658.

BRIEF OPPOSING MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL

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In the main, appellee's motion avoids the grave and substantial Constitutional questions presented to this Court, with lengthy argument being devoted to matters irrelevant to these issues.

For example, appellee states (page 4 of its motion)—"Tumors should be measured to determine if a patient is improving". Since the State's paid informer-witness, Flores, had leukemia, a condition which is a blood disease, this reference is certainly of no pertinency to the "criminal" statements allegedly made by Dr. Kowan to Flores.

While not attempting to refute defendant and appellant's right to freedom of expression and opinion as a Doctor, appellee attacks Dr. Kowan's alleged shortcomings in his procedures of treatment as to informer witness Flores. Flores was not a bona fide patient, of course, nor did he actually seek medical treatment from Dr. Kowan, merely seeking to institute a prosecution against the Doctor.

And, whether or not, for example, appellant had in fact requested Flores' records of previous treatment from a Veterans Administration Hospital could have no bearing whatsoever upon Dr. Kowan's expressions concerning "Laetrile." It is of interest, nevertheless, and contrary to what appellee states, that Dr. Kowan and his office staff did repeatedly attempt to obtain these records (Reporter's Transcript, pages 1633, 1634, 1643, 2917, and 2927), understandably receiving no cooperation from Flores.

Appellee also urges that the un-Constitutional intrusion by the State upon Dr. Kowan's private premises, and unauthorized use of electronic "eavesdropping" equipment to gather evidence against him should be dismissed and sanctioned by this Court simply because the tape recordings obtained were not in themselves offered in evidence, and even though it is an obvious fact that the "fruits" derived therefrom were presented to the jury in the form of testimony.

Other various instances wherein appellee has failed to meet the issues involved herein could be cited by appellant. Suffice it to say, however, that its failure to do so necessarily confirms the validity and substance of the very substantial Constitutional issues before the Court.

No Justification Concerning Prosecutor Misconduct

It is true, of course, as appellee states, that the jury herein was instructed to be governed by the evidence introduced at the trial. Appellee contends that this automatically erased all passion or prejudice created by any prosecutor misconduct. It is respectfully submitted that no instruction could possibly have remedied the denial of a fair trial herein caused by Prosecutor Reiner's gross misconduct. As was observed in a recent decision of this Court (*Bruton* v. *United States,* 391 U.S. 123, 129, 88 Supreme Court 1620, 1624, quoting an opinion by the late Mr. Justice Jackson):

> "A naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Appellee further seeks to justify the prosecutor's misconduct on the premise that Court admonitions to the jury can obliterate it, or if no request has been made for an admonition the misconduct then becomes permissible and proper. As to this cause, no admonition to the jury could, or did, have any such effect. Nor, were defendant and appellant's repeated objections to such misconduct, or motions for mistrial, of any benefit.

Even in the absence of any objections, whatsoever the circumstances herein nevertheless would amply warrant intervention of this Court to protect Dr. Kowan's right to a fair and impartial trial, free of passion and prejudice.

In the case of *Viereck* v. *United States,* 318 U.S. 236, 247, and 248 (cited hereinbefore in defendant and appellant's Jurisdictional Statement, at pages 7 and 16), the remarks of the United States Attorney therein were considered so prejudicial and detrimental to the defendant's right to a fair trial, that it was held that the trial judge should have stopped them without even waiting for any objection.

Misstatements Concerning Laetrile

Appellee's motion is replete with misstatements concerning the nature of the record herein as it pertains to the cancer therapy, "Laetrile". For example, it is stated (page 5) that the California Cancer Advisory Council tested Laetrile, whereas the Council never tested Laetrile as to even one cancer patient. Likewise, no State witness had ever employed Laetrile as to any cancer patient. The prosecution did introduce a 1963 report (Peoples Ex. 5) of the Council based upon 44 cases of terminal cancer patients treated by *outside physicians* who were unanimous in their endorsements of Laetrile. These physicians reported that *64.7%* of the patients were improved by Laetrile. Dr. Kenneth Ernst, executive head of the Cancer Advisory Council, who testified concerning the report, and cited by the State in its motion as "expert" concerning Laetrile, acknowledged on cross-examination that he had never seen any of these patient reports, cases, or any other report, nor had he personally examined the records. (Reporter's Transcript, page 860)

Appellee's motion is silent concerning favorable results achieved with Laetrile as to many cancer patients. Dr. Ernesto Contreras, a scientist who testified for the defense, clinical pathologist and hematologist, and Professor

of histology and pathology, testified as to his favorable experience with Laetrile in treating approximately 500 cancer patients. Similar favorable results were attested to by other defense experts, and by Dr. Kowan himself. One patient treated by Dr. Kowan (Ezra Laury) had been afflicted with a most serious type of leukemia (known as aleukemic leukemia), his condition having improved dramatically under Laetrile therapy (Rep. Tr., pages 2922, 2924, 2926).

Appellee also ignores the international recognition granted to Laetrile by prestigious scientific organizations such as the International Union against Cancer (see pages 11 and 12 of defendant and appellant's jurisdictional statement herein). Obviously appellee would hesitate to argue that it is "criminal" for Dr. Kowan to make favorable professional statements concerning a therapy endorsed by some of the leading Doctors of the World.

In view of what the entire record herein reveals, how can appellee possibly contend that Dr. Kowan's expressions of opinion concerning Laetrile constituted a "crime" under the statutes herein challenged by defendant and appellant?

No Due Process Accorded under State's Own Regulation

As previously noted in the Jurisdictional Statement herein, defendant and appellant contends that Sections 1714 and 26286 of the California Health and Safety Code are per se unconstitutional. He also contends that the procedures employed against him under said statutes violated his Constitutionally-guaranteed rights. The State, in its Health and Safety Code, having provided detailed administrative procedures to protect rights of physicians thereunder before any doctor could be barred from recommending a cancer therapy, he was entitled to a full hear-

ing on the merits of the therapy, to be followed by a formal "cease and desist" order in the event of an adverse ruling, the order being subject to subsequent court review. Then, and only then, could a doctor be deemed "on notice" that his recommendation of a specific therapy could violate any law. No "cease and desist" order was ever obtained against Dr. Kowan as to Laetrile.

At page 3 of its motion, appellee purports to respond to these issues by citing a regulation (Section 10400.1(d), Title 17, Chapter 5, sub-Chapter 2, Article 2, California Administrative Code), which from the partial quotation set forth would apparently have barred Dr. Kowan, without notice or hearing, from expressing favorable professional opinions concerning Laetrile. However, the portion of the regulation deleted by appellee from its motion clearly shows that Dr. Kowan was entitled to such due process, it being provided therein that the State first should "take appropriate steps to cause such person to *cease and desist* from such representation . . ."

Thus, the very regulation relied upon by appellee precisely validates and supports the contentions of defendant and appellant.

Presumption in Favor of Free Communication

There is always a presumption in favor of freedom of opinion and communication. Citing this Court's opinion in *New York Times Co.* v. *Sullivan,* the U. S. Court of Appeals for the District of Columbia (*Liberty Lobby, Inc.* v. *Drew Pearson* (1968), 390 F2d 489, 491) recently stated, apropos of the case at bar:

> "While the right of expression and publication is not absolute, *the balance is always weighted in favor*

of free expression and tolerance for error is afforded; some utterances are protected not because of their merit or truth but because a free, open society elects to take a calculated risk to keep expression uninhibited." (Emphasis added)

Conclusion

Appellee presents no valid reason why this Court should deny the appeal herein. Defendant and appellant respectfully submits that grave and substantial Constitutional issues herein are properly before this Court. He urges that appellee's motion shall be denied, and that this Court shall reverse the judgment below.

Respectfully submitted,

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